



Commonwealth of Massachusetts State Ethics Commission

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CONFLICT OF INTEREST OPINION EC-COI-93-11

FACTS:

You are a member of the General Court. Your district serves as the host to a number of public service projects, regional highways, and state agencies.

Your district will soon experience a large increase in construction activity. You further state that it is now possible for community organizations in your district to work with state agencies and the contractors, to build in binding mitigation requirements for projects affecting the community.

As a Legislator, you are both an elected official and a political leader in your community. You expect that when project proponents seek to discuss mitigation issues with the community, they will ask you for recommendations as to which community groups they should deal with and which mitigation efforts are most important to the community. You view this activity as being within the scope of your official duties and within the range of activities customarily expected of legislators.

In addition to your elected position, you currently serve as one of many members of an advisory committee (Committee), a non-profit entity created by special legislation. The ABC PAC was established to provide community-based advisory assistance to state agencies and others with community input on projects affecting the community.

Neither you nor any member of your immediate family (as defined in G.L. c. 268A, §1[e]) has any financial interest in ABC PAC. Neither you nor any member of your immediate family would have any financial interest in any project. ABC PAC does not contribute to or participate in any individual political fundraising events or individual political campaigns.

ABC PAC will soon appoint some directors of a non-profit community organization's Board of Directors (the "non-profit community organization"). The non-profit community organization is a community-based organization made up of concerned citizens from your district and has been established to aid the community in connection with construction mitigation matters. We presume that the non-profit community organization would benefit, at least in part, from your recommendations and advice concerning community mitigation efforts. Neither you nor any member of your immediate family is a member, director, officer, or employee of the non-profit community organization. Moreover, neither you nor any member of your immediate family would receive any direct or indirect remuneration from the non-profit community organization.

The non-profit community organization will not contribute to or participate in any individual political fundraising events or individual political campaigns. ABC PAC would not derive profit or funding from the non-profit community organization. The non-profit community organization will conduct itself as an organization exempt from federal taxation pursuant to Section 501(c) of the Internal Revenue Code of 1986, as amended, and will make application to the IRS for recognition of such status.

Finally, as a Legislator, you have no authority over or regulatory relationship with any project bidder. You have neither regulatory jurisdiction nor control over agency or authority decisions concerning bidders or their contracts, nor will you directly participate in any negotiations between any bidder and the non-profit community organization.

QUESTIONS:

1. Does G.L. c. 268A permit you to respond to a request from a private party bidding or seeking to bid (a “Bidder”) on a public works project or a project of a public authority which may directly or indirectly impact your district (collectively, the “Project”) for a recommendation as to non-profit community organizations which a Bidder may wish to work with on community mitigation issues?

2. Does G.L. c. 268A permit you to recommend certain mitigation efforts in response to an inquiry from a Bidder on a Project for suggestions of mitigation efforts which may either increase community support for the Project or decrease community opposition to the Project, which mitigation efforts may include contributions to certain non-profit community organizations for use in community projects or programs?

ANSWERS:

1. Yes, subject to any relevant limitations discussed below.

2. Yes, subject to any relevant limitations discussed below.

DISCUSSION:

As a member of the General Court, you are a state employee as that term is used in the conflict of interest law. Certain provisions of G.L. c. 268A are relevant to your questions.

Section 23

The Commission has long held that when a public employee solicits anything of substantial value^{1/} from persons within his regulatory jurisdiction an issue is raised under §23 of G.L. c. 268A. *EC-COI-90-9* (state official prohibited from soliciting vendors of his agency to support political candidate); *82-124* (County Commissioner prohibited from privately selling insurance to county vendors whose contracts he oversees); *81-66* (corrections officer prohibited from catalog selling to inmates within his custody). This is because G.L. c. 268A, §23(b)(2) prohibits a state employee from using his position to secure unwarranted privileges of substantial value for himself or others which are not available to similarly situated individuals. The Commission has recognized in applying this provision the “inherently exploitable nature” of the situation where a public official is soliciting from someone within his regulatory jurisdiction. *See EC-COI-92-12* (Board member prohibited from soliciting individuals under his regulatory authority).

Applying §23(b)(2) in *EC-COI-92-28*, the Commission concluded that certain proposed business solicitations, which would have been made by the Governor, would have violated §23(b)(2) — unless specifically permitted by law — because those solicitations would have resulted in a non-state entity receiving an unwarranted privilege of substantial value. In the present case, not only is there no regulatory nexus between the Bidders and your office, but also your proposed actions would not appear to constitute a “solicitation” within the meaning of *EC-COI-92-28*. Rather, your actions appear to be more consistent with your official duties as a state legislator performing constituent services. *See, e.g., Public Enforcement Letters 92-1 and 92-2; see also Advisory No. 13 (Agency).*

Where your proposed actions would be limited to making recommendations and responding to requests, we find that you would not be engaging in active solicitation or using your official state office for personal or private (non-public) purposes. Accordingly, your situation is distinguishable from *EC-COI-92-28* and *92-5* (use of state seal prohibited for fundraising or campaign purposes as such activities benefit personal rather than public interest) and therefore does not raise an issue under §23(b)(2). Should you later seek to actively solicit Bidders, you should seek further advice from this Commission.

Section 6

Section 6 prohibits a state employee (including a member of the General Court) from participating^{2/} as a public official in any particular matter^{3/} in which he, his immediate family members,^{4/} or a partner or a business organization which he is serving as an officer, director, trustee, partner or employee, or any person with whom he is negotiating or has any arrangement concerning prospective employment, has a financial interest.^{5/}

As a member of the General Court, you would participate in a particular matter whenever you interject yourself, as a state representative, into mitigation or other matters. *See, e.g., Craven v. State Ethics Commission*, 390 Mass. 191 (1983), and *In re Craven*, 1980 SEC 17. Accordingly, if you, an immediate family member, or an organization (including a non-profit) in which you serve as an officer, director, trustee, partner or employee, have a direct or a reasonably foreseeable financial interest in a given matter, §6 would prohibit your participation in that matter. For example, issues will arise for you under §6 **if** (i) you serve as a member of the Board of Directors of the non-profit community organization established by ABC PAC, **and** (ii) that non-profit has a financial interest in a mitigation matter, **and** (iii) you intervene as a state representative (by making recommendations or responding to vendors or state agencies, for example), in that mitigation matter. Assuming, however, that you (as well as members of your immediate family) will not have any personal financial interest in the construction projects or related mitigation matters, and provided that you do not serve as an officer, director, partner or employee of any business organizations with a financial interest in the construction projects or the mitigation matters, an issue under §6 will not be raised as a result of your proposed activities.

This opinion is based solely on the facts as you have presented them. Should the scope of your activities concerning community mitigation efforts or your relationship with the non-profit community organization or any other interested organizations change, you should seek further advice from the Ethics Commission.

Date Authorized: April 27, 1993

¹/Anything valued at \$50 or more. *Commonwealth v. Famigletti*, 4 Mass. App.Ct. 584, 587 (1976); *Commission Advisory No. 8*.

²/"Participate," participate in agency action or in a particular matter personally and substantially as a state, county or municipal employee, through approval, disapproval, decision, recommendation, the rendering of advice, investigation or otherwise.

³/"Particular matter," any judicial or other proceeding, application, submission, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, decision, determination, finding, but excluding enactment of general legislation by the general court and petitions of cities, towns, counties and districts for special laws related to their governmental organizations, powers, duties, finances and property. G.L. c. 268A, §1(k).

⁴/"Immediate family," the employee and his spouse, and their parents, children, brothers and sisters. G.L. c. 268A, §1(e).

⁵/Note that the definition of a "particular matter" expressly excludes the enactment of *general* (as opposed to "special") legislation.